Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977
No. 76-1787

CHARLES L. LEVY,

Petitioner,

vs.

IRVING J. COHEN, JACK MOSHEIN and HARRY A. ZIDE,

Respondents.

Response of Respondents in Opposition to Petitioner's Petition for Writ of Certiorari to the Supreme Court of California.

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I.

Questions Presented.

Charles L. Levy, Plaintiff-Petitioner, has filed a Petition for Writ of Certiorari to the Supreme Court of California contending that he had the right to make a collateral attack in the California State Court upon an order (Judgment) (which became final) confirming the plan of arrangement entered by a Bankruptcy Court in a Federal District Court in a Chapter XII proceeding of a limited partnership which discharged the general partners (being the three (3) defendants-respondents in this matter) from personal liability for partnership debts.

Petitioner's contention is that the Bankruptcy Court did not have jurisdiction to make such Order.

II.
Statements of the Case.

The statements of the case set out in Petitioner's Petition should be supplemented by the following facts:

1. The Plaintiff-Petitioner made the loans, which were the subject of his action in the Los Angeles Superior Court to the limited partnership in January and February of 1968.

2. From a time prior to the making of the aforementioned loans the Plaintiff-Petitioner was and still is a limited partner of Beverly Crest Convalescent Hospital, a California limited partnership, of which the three Defendants-Respondents are the General Partners.

3. From November 1970, which was one month after the proceeding for a real property arrangement under Chapter XII of the Federal Bankruptcy Act was commenced by the Beverly Crest Convalescent Hospital (hereinafter referred to as the "partnership"), the Plaintiff-Petitioner was employed by the Trustee-Receiver in bankruptcy having jurisdiction over the said bankruptcy proceeding and was so employed until November 1973. This was four (4) months after the Order was signed and filed by the Bankruptcy Judge and which Order exonerated the Defendants-Respondents from the liabilities of the limited partnership.

4. The duties of the Petitioner-Plaintiff for the Receiver-Trustee were (using his own testimony):

"Assisting the receiver-trustee in managing, conserving and overseeing the facilities and equipment located therein; performing public relations services and meeting with interested groups on refinancing or purchasing the hospital facilities."

5. The Plaintiff-Petitioner Charles L. Levy was named as an unsecured general creditor on schedule A-3 of the application for bankruptcy filed by the limited partnership and signed by the three (3) General Partners (Respondents herein).

6. Subsequently, the Plaintiff-Petitioner filed a proof of claim in bankruptcy (dated June 12, 1973) but filed *after* May 13, 1974 and on August 6, 1974 the attorneys for the Plaintiff-Petitioner received a letter from the attorneys for the Trustee in Bankruptcy stating that the claim filed on behalf of Charles L. Levy was late filed and barred because the last date to file claims was May 13, 1974.

7. The counsel for the Plaintiff-Petitioner stated to the State Trial Court "I further represent to the Court my firm specializes in insolvency (Bankruptcy Proceedings). I have read the plan of arrangement. This is what is sent to the unsecured creditors."

8. The record of the said Bankruptcy Court showed that a meeting of creditors was held before John E. Bergener, Bankruptcy Judge, on June 26, 1973 to consider the plan of arrangement filed on May 15, 1973; the notice of such meeting was mailed to all creditors and that an order confirming the said plan of arrangement was signed and filed on July 3, 1973.

9. The three (3) Defendants-Respondents did act throughout the Bankruptcy proceedings as the General Partners of the said Limited Partnership and did sign as said General Partners the plan of arrangement which was followed by the Order confirming the plan of arrangement. They were both General and Limited Partners and collectively owned 49% of the Limited Partnership.

10. On July 17, 1974 the Defendant-Respondent Irving J. Cohen, D.D.S., filed and served on counsel for the Petitioner a Notice of Motion to Supplement the Answer of Dr. Irving J. Cohen by adding as an affirmative defense to his Answer to Complaint in the State Court the order of the Bankruptcy Court exonerating him and the other two (2) General Partners as such General Partners from the liabilities of the limited partnership.

The motion to file such supplement to the answer to the complaint was heard on July 31, 1974 in the Los Angeles Superior Court. There was no opposition of any kind to such motion by the Plaintiff-Petitioner. The motion was granted at that time. In addition, there was no demurrer or other Pleadings filed afterwards by the Plaintiff-Petitioner to such supplemental answer making any attack whatsoever on the additional affirmative defense.

11. The proposed plan of arrangement set out "Confirmation of the plan of arrangement shall be deemed a full and complete release and settlement in full of any and all claims provable under the provision of the Bankruptcy Act against:

i. Beverly Crest Convalescent Hospital, a California corporation;

ii. Beverly Crest Convalescent Hospital, a California Limited Partnership;

iii. Harry A. Zide, Irving J. Cohen and Jack Moshein.

12. The Plan of Arrangement provided for a sale of the hospital facilities of the Limited Partnership to two individuals.

The Plan stated that the three General Partners (Respondents herein) have substantial claims estimated to approximate $500,000.00 which, for the purposes of the plan only, were to be subordinated to payment of claims of all other general unsecured creditors.

13. The order confirming the plan of arrangement set out that it had been accepted by an appropriate number of creditors holding an aggregate amount of claims required to approve said plan pursuant to the provisions of the Bankruptcy Act and also set out that upon the entry of the Order, Drs. Harry A. Zide, Irving J. Cohen and Jack Moshein were released and discharged from any and all debts, liabilities and obligations whatsoever incurred in connection with the operations, construction and maintenance of the business, properties and assets of the debtors herein as well as from the conduct of the business operations and activities of said debtors and that the Order shall be and constitute a defense as to the assertion of any such claims and evidence of the discharge thereof.

The order was signed and filed on July 3, 1973 and no attack of any kind having been made on such order it became final.

14. The indebtedness of the limited partnership owed to the Plaintiff-Petitioner as of the filing of the Chapter XII proceeding was a claim provable against the Limited Partnership.

15. The official records of the Bankruptcy Judge having jurisdiction over the bankruptcy proceedings contained a statement that a clerk in his office had mailed a true copy of the notice of meeting (to be held June 26, 1973) to all creditors as they appeared in the list of creditors of the said bankrupt-debtor; that

the record of the said Bankruptcy Court further showed that a meeting of creditors was held before the Bankruptcy Judge on June 26, 1973 to consider the plan of arrangement filed in the proceeding on May 15, 1973 and that notice of such meeting was mailed to all creditors.

III.

Arguments.

1. The Plaintiff-Petitioner Charles L. Levy cannot make a collateral attack on a judgment of the Federal Court which has become final.

2. The Plaintiff-Petitioner is doing what the decisions of the Supreme Court of the State of California and the Supreme Court of the United States of America have ruled one cannot do—that is, one cannot make a collateral attack upon a judgment of a Federal Court which has become final in which the Plaintiff-Petitioner failed to raise the question as to the lack of jurisdiction of the Bankruptcy Judge to make the Order in the Bankruptcy proceeding to which he was a party and in which proceeding he could have raised such a question with the right of review to the Federal District Judge and the right of appeal from the latter's decision if adverse to him.

3. If the Plaintiff-Petitioner had gone to the Bankruptcy Court and contended that the Court had no jurisdiction to make such Order and that the three (3) General Partners should not be exonerated from the debts of the Limited Partnership then the three (3) General Partners would have become indispensable and necessary parties to such action by the Plaintiff-Petitioner and would have necessarily become litigants in such action.

4. However, the Plaintiff-Petitioner chose, for some unknown reason, to avoid the forum of the Federal District Court and sought to make a collateral attack upon the Order of the Bankruptcy Court in the State Court contending that the Bankruptcy Court lacked jurisdiction to make such an Order.

5. Section 367 (371) of the Bankruptcy Act provides for the effect of a confirmation as follows:

> *"The arrangement and its provisions shall be binding upon the debtors,* upon any person issuing securities or acquiring property under the arrangement *and upon all creditors of the debtor,* whether or not they are affected by the arrangement or *have accepted it or have filed their claims,* and whether or not their claims have been scheduled or allowed and are allowable" . . . (Emphasis added).

6. In the case of *Martin v. Martin* (1970) 2 Cal.3d 752 at 759, 761-763 the Court held as follows:

> "Under Section 39 (c) (11 U.S.C. § 67 (c)) any person aggrieved by an Order of a Referee may challenge the Order by a Writ of Review if timely made. A Referee's Orders, even when acting in a judicial capacity and as the Court, are subject to review by the Judge upon timely application to that end; but they are res judicata unless upset on review and no more subject to collateral attack than judgments and decrees generally. (2 Remington on Bankruptcy (1956) § 619, p. 78; also, 2 Collier on Bankruptcy (14th Ed. 1969) § 38.02, pp. 1397-1400).
>
> A Federal Court judgment has the same effect in the Courts of California as it would in a Federal Court.

The Federal rule is that a judgment or Order, once rendered, is final unless reversed on appeal or modified or set aside in the Court of rendition. It may not be collaterally attacked in another Court forum.

Even if the Bankruptcy Court erred in its interpretation of the agreement an erroneous judgment is as conclusive as a correct one." (Emphasis added).

Citing *Panos v. Great*, 21 Cal.2d 636 at 640.

IV.
Applicable Law.

It is difficult to augment the decision of the Supreme Court of California on this matter.

The opinion sets out the pertinent facts, the principles of law involved and the case law applicable to such facts and principles.

The entire basis of the Petitioner's argument is that the Bankruptcy Court lacked jurisdiction to enter the Order which it did and that the Petitioner had the right to make a collateral attack upon such Order in another forum.

There are two recent Federal Circuit Court of Appeals decisions bearing on this point.

In the case of *Lubben v. S.S.S.*, 453 F.2d 645, (First Circuit 1972) the Court stated:

> "A void Judgment is to be distinguished from an erroneous one, in that the latter is subject only to direct attack.
>
> A Court has the power to determine its own jurisdiction and an error in that determination will not render the Judgment void.

> Since that determination could have been attacked in an appeal it is now res judicata and immune from collateral attack."

In another case, *In re Trimble Co.*, 479 F.2d 103 (Third Circuit 1973), that Court stated:

> "Even if the Court erred in its assumption that it had jurisdiction, the judgment would not be void but only in error and therefore, if not challenged on appeal, it would become final and immune from collateral attack."
>
> Citing—*Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 317 (1940).

The case of *Duke v. Durfee*, 375 U.S. 106, 845 S.Ct. 242 (1963) states "a judgment is entitled to full faith and credit—even as to questions of jurisdiction".

V.
Conclusion.

We have here a situation where a Limited Partner of a Limited Partnership filed an action in a State Court for loans made to the Limited Partnership suing the three General Partners on the principle they were responsible for the debts of the Limited Partnership which, at the time of the commencement of the suit, was in a Chapter XII Bankruptcy Proceeding in the local Federal District Court.

Soon after the Bankruptcy Proceedings were commenced and until four months after the Order being attacked was entered the Plaintiff-Petitioner was employed by the Receiver-Trustee in Bankruptcy for the Limited Partnership.

During the Trial in the State Court, counsel for the Plaintiff-Petitioner stated to the Trial Court that his firm specialized in insolvency, and that he had read the plan of arrangement.

The Plaintiff-Petitioner was listed as a general unsecured creditor in the Bankruptcy Proceedings and he received notices of the proceedings in the Bankruptcy Proceedings. He filed a claim in the proceedings but it was filed too late.

He had ample opportunity to object to the plan of arrangement and the Order confirming such plan. He had the same opportunity to object to the Order being added as an additional affirmative defense to the answer to complaint of one of the Respondents (Defendant in the State Court action).

Defendants-Respondents respectfully submit that the opinion of the Supreme Court of California in the present action is a correct one and follows decisions of the Supreme Court of the United States and of the Supreme Court of California and that the negligence of the Plaintiff-Petitioner in failing to assert his contentions in the Federal Bankruptcy Court when he had ample opportunity to raise such contentions did not give him the right to re-litigate those issues in the State Courts.

As the Supreme Court of California concluded in its decision:

> "Plaintiff-Petitioner here had notice of the meeting of creditors and he does not suggest that he was denied an opportunity, at such meeting, to raise his objections that the Bankruptcy Court lacked jurisdiction to discharge defendants (Respondents) from liability for the obligations of

> the Limited Partnership. Since the objection could have been raised in the Bankruptcy proceeding, the order confirming the plan of arrangement is conclusive in the present action insofar as such Order determined that Defendants (Respondents) are not liable for obligations of the Limited Partnership".

It is, therefore, respectfully submitted by the Defendants-Respondents that the Petition of the Plaintiff-Petitioner for a Writ of Certiorari to the Supreme Court of California be denied.

Dated: September 1, 1977, Los Angeles, California.

Respectfully submitted,

DAVID A. MATLIN,
Attorney for Defendants-Respondents.